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No. 98 ——

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

KANSAS CITY SOUTHERN RAILWAY COMPANY,
*Petitioner*,
v.
CHARLOTTE MCKENNA, *et al.*,
*Respondents*.

**Petition for a Writ of Certiorari to the Circuit Court of Hinds County, Mississippi, First Judicial District**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the Mississippi state court correctly held—in conflict with this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), and the clear intent of Congress—that the tort claims of plaintiffs below were not pre-empted by the Federal Railroad Safety Act and applicable regulations issued under the Hazardous Materials Transportation Act.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Kansas City Southern Railway Company ("KCS") was petitioner before the Mississippi Supreme Court and defendant before the Hinds County Circuit Court. Pursuant to S. Ct. Rule 29.6, KCS notes that its parent is Kansas City Southern Industries, Inc. Affiliated companies of Kansas City Southern Industries, Inc., are Gateway Western Railway Company, Gateway Eastern Railway Company, Berger Associates, Inc., Janus Capital Corporation, Southern Group, Inc., Southern Capital Corporation, L.L.C., Southern Industrial Services, Pabtex, Inc., Superior Tie & Timber, Trans-Serve, Inc., The Texas Mexican Railway Company, and Transportacion Ferroviaria Mexicana.

Respondents are over 4,000 plaintiffs who have filed suit against KCS in Hinds County Circuit Court; named respondent Charlotte McKenna is one of the plaintiffs. A complete listing of plaintiffs appears at App. 1 to KCS's Petition for Interlocutory Appeal to the Supreme Court of Mississippi.

Union Tank Car Company, Illinois Central Railroad Company, Gaylord Chemical Corporation, Gaylord Container Corporation, Vicksburg Chemical Company, Arie Genger, Cedar Chemical Corporation, Nine West Corporation, Trans-Resources, Inc., and TPR Investment Associates, Inc., are also respondents pursuant to S. Ct. Rule 12.6.

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*Respondents.*

**Petition for a Writ of Certiorari to the Circuit Court of Hinds County, Mississippi, First Judicial District**

## PETITION FOR A WRIT OF CERTIORARI

The Kansas City Southern Railway Company ("KCS") respectfully petitions for a writ of certiorari to review the judgment of the Circuit Court of Hinds County, Mississippi, in this case.

## OPINIONS BELOW

The decision of the Mississippi Supreme Court denying KCS's petition for an interlocutory appeal from the decision of the Hinds County Circuit Court is unreported and reprinted in the appendix hereto ("App.") at 1a. The judgment of the Hinds County Circuit Court is unreported and reprinted at App. 2a.[1]

[1] The Mississippi Supreme Court denied KCS's petition for an interlocutory appeal from the trial court's decision. The decision of the trial court thus is the judgment of the highest court in which decision could be had. *See Virginian Ry.* v. *Mullens*, 271 U.S. 220, 222 (1926).

## JURISDICTION

The order of the Mississippi Supreme Court denying review was entered on June 22, 1998. App. 1a.[2] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*, and of the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.*, are reprinted at App. 6a-18a.

## INTRODUCTION

Article VI of the Constitution declares that the laws of the United States are the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. State law found to conflict with federal law is "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819).

The "ultimate touchstone" of this Court's pre-emption analysis is congressional intent. *Retail Clerks Int'l Ass'n, Local 1625* v. *Schermerhorn*, 375 U.S. 96, 103 (1963). The intent of Congress to pre-empt state law may be "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977). When the statute in question contains an express pre-emption clause, this Court must "in the first instance focus on the plain wording of the clause, which necessarily contains the

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[2] The time for filing a petition for writ of certiorari runs from the date of the highest state court's refusal to review the decision of the lower court. *American Ry. Express Co.* v. *Levee*, 263 U.S. 19, 20-21 (1923).

best evidence of Congress' pre-emptive intent." *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993).

The Federal Railroad Safety Act ("FRSA") contains such a pre-emption clause. State railroad safety standards—including those established by common law duties—may remain in effect only until the Secretary of Transportation has promulgated regulations covering the subject matter of the state standards. 49 U.S.C. § 20106. Pursuant to his authority under the FRSA, and pursuant to Congress's express desire for *national* regulation of railroad safety, the Secretary of Transportation has promulgated comprehensive federal railroad safety regulations—including comprehensive regulations covering the subject matter of rail transportation of hazardous materials, inspection and repair of tank cars, training and certification of tank car inspectors and hazardous-materials employees, and response procedures for emergency situations involving hazardous materials transported by rail.

KCS is a defendant in roughly 4,000 individual state court actions in Mississippi, as well as a massive Louisiana state court class action, brought on by the rupture of a railroad tank car and the resulting release of dinitrogen tetroxide, a hazardous chemical. Plaintiffs in these state court lawsuits invoked widely divergent punitive damages statutes. *See* Miss. Civ. Prac. & Proc. § 11-1-65; La. Civ. Code art. 2315.3 (repealed but applicable to the conduct at issue). Plaintiffs' claims against KCS—a railroad with only the most tangential connection to the chemical release—involve questions regulated by the federal government to the last detail. These claims are therefore pre-empted by the FRSA. The trial courts below, however, refused to dismiss respondents' state law claims, and neither the Mississippi nor the Louisiana appellate courts remedied the trial courts' clear error. This Court should intervene. Allowing two sets of state court actions against KCS to go forward on the basis

of state claims pre-empted by the FRSA flouts this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), defies the clear language of the FRSA, and thwarts the Supremacy Clause.

## STATEMENT OF THE CASE

### A. Statutory and Regulatory Background

The railroad industry has been subject to comprehensive federal regulation for over a hundred years. Beginning with the Safety Appliance Act of 1893, 49 U.S.C. § 20301 *et seq.*, and up to the present, Congress has undertaken to regulate "almost all aspects of the railroad industry, including rates, safety, labor relations, and worker conditions." *R.J. Corman R.R.* v. *Palmore*, 999 F.2d 149, 151-152 (6th Cir. 1993). The industry's long history of "pervasive and uniquely-tailored congressional action indicates Congress's general intent that railroads should be regulated primarily on a national level through an integrated network of federal law." *Id.* Federal regulation ensures uniformity of rules and regulations for railroads, which frequently operate across state lines, and have for more than a century been vital to the flow of interstate commerce in this country. *See generally* William H. Rehnquist, *The Supreme Court* 167-170, 175-185 (1987) (discussing the rise and regulation of railroads).

One of the many areas covered by federal law is railroad safety. In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA") with an express purpose: to "promote safety in *every area* of railroad operations." 49 U.S.C. § 20101 (emphasis added).[3] The FRSA requires the Secretary of Transportation to "prescribe regulations and issue orders for *every area* of railroad safety,"

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[3] Originally codified at 45 U.S.C. § 421 *et seq.*, the FRSA was recodified in 1994, when Congress recodified all "laws related to transportation in one comprehensive title." H.R. Rep. No. 103-180, at 3 (1993).

*id.* § 20103(a) (emphasis added), and requires the Secretary to "consider existing relevant safety information and standards" in prescribing regulations and issuing orders under the Act. *Id.* § 20103(c). States may participate in "investigative and surveillance activities" to enforce federal safety regulations, if certified by the federal government. *Id.* § 20105; *see also* 49 C.F.R. § 212.1 *et seq.* (state safety participation regulations); *Missouri Pac. R.R.* v. *Railroad Comm'n of Tex.*, 833 F.2d 570, 578 (5th Cir. 1987) (FRSA "recognized and explicitly preserved the state's participation *in enforcement of the federal scheme*") (emphasis added).

While states are allotted a role in enforcing federal standards, the FRSA makes clear that "[l]aws, regulations and orders related to railroad safety shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106; *see also Rayner* v. *Smirl*, 873 F.2d 60, 65 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989); *Donelon* v. *New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.) ("The ultimate goal of the Act is to establish nationally uniform control of railroad safety"), *cert. denied*, 414 U.S. 855 (1973). The legislative history of the FRSA also confirms Congress's intent to exert primary—indeed, nearly exclusive—authority over railroad safety. Congress recognized that the national railroad system was a unique entity, demanding a level of federal regulatory involvement not typical of other industries. Because "the vast bulk of railroad mileage, and operations thereover, are by companies whose operations extend over many State lines," H.R. Rep. No. 91-1194, at 13 (1970), Congress concluded that the safety of the Nation's railroad system would not be advanced by "subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." *Id.* at 11. Rather, the best and most efficient way to ensure the safety of the national railroad system was to "make all [safety] enforcement Federal in nature." *Id.*

Pursuant to his authority under the FRSA, the Secretary has promulgated detailed regulations governing railroad safety enforcement procedures, including inspection procedures, *see* 49 C.F.R. § 209.1 *et seq.*; railroad operating practices, *see id.* § 218.1 *et seq.*; safety standards for railroad locomotives, *see id.* § 229.1 *et seq.*; safety standards for grade crossings, *see id.* § 234.1 *et seq.*; and standards for the qualification and certification of engineers, *see id.* § 240.1 *et seq.* A railroad violating FRSA regulations is subject to civil penalties, *see* 49 U.S.C. § 20111, and the Attorney General has authority under the Act to initiate a civil action to enjoin a violation of safety regulations. *Id.* § 20112. States may bring actions to enjoin the violation of a railroad safety regulation or for civil penalties, if the Secretary of Transportation fails to bring an action within a specified period of time. *Id.* § 20113.[4]

Railroad transportation of hazardous materials in particular is governed by a second statute as well, the Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 5101 *et seq.* Enacted in 1975, the HMTA establishes an "elaborate scheme for the designation, handling, packaging, labeling, and shipping of hazardous materials." *New Hampshire Motor Transp. Ass'n* v. *Town of Plaistow*, 67 F.3d 326, 331 (1st Cir. 1995), *cert. denied*, 517 U.S. 1120 (1996); *see also Southern Pac. Transp. Co.* v. *Public Serv. Comm'n of Nev.*, 909 F.2d 352, 358 (9th Cir. 1990) (HMTA designed to implement "uniform, national scheme of regulation"). Enacted to "improv[e] the regulatory and enforcement authority of the Secretary of Transportation" over the transportation of hazardous material, 49 U.S.C. § 5101, the HMTA requires the Secretary to prescribe "regulations for the safe transportation of hazardous material in intra-

[4] States may not bring enforcement actions where the Secretary has certified that no violation of federal standards occurred. 49 U.S.C. § 20113(a).

state, interstate, and foreign commerce," *id.* § 5103(b)(1), and provides that the regulations shall govern "safety aspects of the transportation of hazardous material the Secretary considers appropriate." *Id.* § 5103(b)(1)(B).

Pursuant to this mandate, the Secretary has promulgated comprehensive regulations under the HMTA. *See* 49 C.F.R. §§ 171-179;[5] *see also Chlorine Inst., Inc.* v.

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[5] The regulations address, among other things:

- Pre-departure, interchange, and in-transit inspection of tank cars, *see* 49 C.F.R. Part 174;
- Manufacturing specifications for various types of tank cars, *see id.* Part 179;
- Equipment specifications for tank cars, *see id.*;
- Periodic testing of tank cars, *see id.* § 173.31(c);
- Repair and maintenance of tank cars, *see id.* Part 179 and Appendix R of the Association of American Railroads Specifications for Tank Cars;
- Marking and placarding of tank cars for identification of contents, *see id.* Parts 172, 174;
- Maximum pressure and weight limitations for compressed gases in tank cars, *see id.* §§ 173.314(c), 179.13;
- Identification and classification of hazardous materials, *see id.* Part 172;
- Documentation to accompany the transportation of hazardous materials, *see id.*;
- Hazardous materials transportation procedures, including loading and securing closures of tank cars, *see id.* Part 173;
- Handling of leaking tank cars, *see id.* and *id.* Part 174;
- Allocation of duties among shippers, originating carriers and interchange carriers, *see id.* Part 173;
- Operating rules governing hazardous-materials employee conduct and tests and inspections to ensure compliance with those rules, *see id.* Part 172;
- Education and training of hazardous-materials employees, *see id.*;
- Hazardous material release emergency notification procedures and maintenance of information necessary for response to hazardous materials incidents, *see id.* Part 171; and
- Public sector emergency response procedures, education, and training for response to hazardous materials incidents, *see id.* and *id.* Part 110.

*California Highway Patrol*, 29 F.3d 495, 497 (9th Cir. 1994) (HMTA regulations "impose extensive requirements" for shipment of hazardous chemicals). As with the FRSA, the HMTA has numerous enforcement provisions, allowing the Attorney General to bring civil actions to enforce that Act or its regulations and to seek "appropriate relief, including punitive damages" against a violator. 49 U.S.C. § 5122(a). The HMTA provides for civil penalties of up to $25,000 for a violation of the Act or its regulations, *id.* § 5123, and for criminal fines or imprisonment for up to five years for a willful violation of the Act or its regulations. *Id.* § 5124.

The FRSA contains an express pre-emption clause, displacing state law in all but certain narrow circumstances. By its plain terms, the FRSA allows state laws, rules, regulations, orders, or standards relating to railroad safety to remain in place only "until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.* § 20106.[6] "Legal duties imposed on railroads by the common law," including through negligence claims, are equally susceptible to FRSA pre-emption. *Easterwood*, 507 U.S. at 664. The FRSA's pre-emption clause applies to "*any* regulation 'adopted' by the Secretary * * * regardless of the enabling legislation." *Id.* at 663 (emphasis added). Accordingly, regulations promulgated by the Secretary under the HMTA must be considered in a FRSA pre-emption analysis, where railroad transportation of hazardous materials is at issue. *See*

[6] Under the FRSA's savings clause, an "additional or more stringent" state law may remain in effect when it (1) is necessary to eliminate or reduce an "essentially local safety hazard;" (2) is not incompatible with a federal law, regulation, or order; and (3) does not unreasonably burden interstate commerce. *Id.* Common law negligence claims do not fall within this savings clause. *Easterwood*, 507 U.S. at 675 ("The common law of negligence provides a general rule to address all hazards caused by a lack of due care, not just those owing to unique local conditions.").

*CSX Transp., Inc.* v. *Public Utils. Comm'n of Ohio*, 901 F.2d 497, 501 (6th Cir. 1990) (considering HMTA regulations in context of FRSA pre-emption analysis), *cert. denied*, 498 U.S. 1066 (1991); *In re Miamisburg Train Derailment Litigation*, 626 N.E.2d 85 (Ohio 1994) (same), *cert. denied*, 513 U.S. 809 (1994).[7]

**B. Factual Background**

The Kansas City Southern Railway Company ("KCS") operates a commercial rail carrier system extending over nearly 2,000 miles of track from Chicago to Veracruz, Mexico and traversing ten states. In October 1995, KCS transported a railroad tank car carrying dinitrogen tetroxide from Vicksburg, Mississippi, east to Jackson, Mississippi, a distance of about forty miles. In Jackson, the railroad car was turned over to the Illinois Central Rail-

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[7] The HMTA's own pre-emption provision provides that a state requirement is pre-empted if (1) complying with the state requirement is "not possible," or if (2) the state requirement poses an "obstacle" to the purposes of the HMTA. 49 U.S.C. § 5125(a). In addition, a state law "not substantively the same" as the federal statutes or regulations is pre-empted if it addresses (1) the "designation, description, and classification of hazardous material;" (2) "packing, repacking, handling, labeling, marking, and placarding of hazardous material;" (3) "preparation, execution, and use of shipping documents related to hazardous materials and requirements related to the number, contents and placement of those documents;" (4) "written notification, recording, and reporting of the unintentional release in transportation of hazardous material;" or (5) the "design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marketed, certified, or sold as qualified for use in transporting hazardous material." *Id.* § 5125(b). Even when considered only under the HMTA's pre-emption provision, putting the FRSA to one side, the state standards in this case are clearly pre-empted under section 5125(a), for the reasons stated in n.16 *infra*. The provisions of section 5125(b) also specifically encompass many of plaintiffs' common law claims, and pre-empt any state standards—including standards arising from common law duties—which are "not substantively the same" as those imposed by the federal regulatory scheme.

road, which transported the car a hundred miles south to the Gaylord Chemical Corporation in Bogalusa, Louisiana, a town near the Mississippi state line. Two weeks after KCS released the tank car to Illinois Central, the tank car ruptured at the Gaylord plant, releasing dinitrogen tetroxide into the air.

Following the chemical release, thousands of plaintiffs in Mississippi filed lawsuits against a dozen defendants. KCS—which had transported the railroad car for forty miles, some two weeks and a hundred miles distant from the accident—was named as a defendant in the Mississippi actions, along with the manufacturer of the dinitrogen tetroxide, the manufacturer of the tank car, the Illinois Central Railroad, and the Gaylord Chemical Corporation, among others. In addition to the roughly 4,000 individual lawsuits filed in Mississippi, thousands of plaintiffs in Louisiana filed class action lawsuits on the same facts against the same defendants (and a dozen insurance companies). The Louisiana actions were consolidated into a single class action,[8] while in Mississippi—which has no class action procedure—the over 4,000 individual actions were consolidated for pre-trial purposes only.

The Mississippi plaintiffs' individual complaints each stated the same allegations against KCS, claiming that KCS was negligent in transporting, maintaining, inspecting, and repairing the railroad tank car, had negligently trained or hired inexperienced hazardous-materials employees, and had failed to implement emergency notifica-

[8] On June 19, 1998, the Louisiana Supreme Court denied KCS's application seeking review of the decision of the trial court in the consolidated Louisiana class action that plaintiffs' claims in that action were not pre-empted by the FRSA and regulations issued under the HMTA. On September 17, 1998, KCS filed a petition for certiorari with this Court (S. Ct. No. 98-465) seeking review of that decision. That petition and this one raise the same questions and should be considered together.

tion procedures to address the possibility of a chemical release. Each of plaintiffs' claims was directed to conduct or procedures that are extensively addressed by the federal regulations adopted under the FRSA and the HMTA. *See supra* at 4-9.

KCS moved for judgment on the pleadings in the Mississippi actions. Explaining that the comprehensive network of FRSA and HMTA safety regulations completely "cover[ed] the subject matter" of each of plaintiffs' claims, 49 U.S.C. § 20106, KCS argued that the claims were pre-empted under the FRSA. The Mississippi trial court rejected KCS's FRSA pre-emption claim and denied KCS's motion for judgment on the pleadings, purporting to rely on this Court's opinion in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993). KCS petitioned the Mississippi Supreme Court for review of the trial court's ruling. That court denied review without comment. App. 1a.[9]

## REASONS FOR GRANTING THE WRIT

### I. THE MISSISSIPPI COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *EASTERWOOD*

A principal consideration governing the exercise of this Court's certiorari jurisdiction is whether a state court "has

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[9] The decision of the state trial court is subject to review by this Court under the fourth prong of *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 482-483 (1975), because "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." Refusal to hear KCS's federal pre-emption claim at this time would also "seriously erode" the federal policy underlying that claim, by subjecting KCS to the burden of a massive state class action trial. *Id.* at 483; *see also Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 178-180 (1988) (reversal of holding that statute not pre-empted by federal law would preclude further proceedings, and failure to review "might seriously erode federal policy"); *Local No. 438 Constr. & Gen. Laborers' Union* v. *Curry*, 371 U.S. 542, 550 (1963) (postponing review of pre-emption claim would "seriously erode" national labor policy).

decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). The Mississippi trial court's refusal to dismiss plaintiffs' tort actions against KCS on pre-emption grounds directly conflicts with this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993).

1. *Easterwood* arose from a wrongful-death suit against CSX, brought by the widow of a man killed when a CSX train collided with his truck at a Georgia railroad crossing. The plaintiff argued that CSX was negligent under Georgia law for failing to maintain adequate warning devices at the crossing and for operating the train at an excessive speed. CSX contended that the FRSA pre-empted both claims. After reviewing the Act's pre-emption provision, this Court posed the pertinent question as being whether the Secretary of Transportation had issued regulations which "substantially subsume[d]" Georgia negligence law pertaining to the "maintenance of, and the operation of trains at, grade crossings." *Easterwood*, 507 U.S. at 664.[10]

CSX argued that three separate sets of federal regulations pre-empted Easterwood's inadequate warning device claim. The first, 23 C.F.R. Part 924, required states receiving federal aid to implement "highway safety improvement programs." Designed to set forth "policy for the development and implementation of a comprehensive highway safety improvement program in each State," *id.* § 924.1, the regulations directed the states to consider, among other things, dangers posed by grade crossings. *Id.* § 924.9(a)(4). The Court rejected CSX's ar-

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[10] Because the FRSA's pre-emption clause requires that the federal regulations "cover" the subject matter of the state law in question, rather than merely "touch upon" or "relate to" the subject matter of that law, the Court concluded that "pre-emption will lie only if the federal regulations *substantially subsume* the subject matter of the relevant state law." *Id.* (emphasis added).

gument that the Part 924 regulations pre-empted Easterwood's negligence claim. The regulations did not "cover the subject matter" of maintenance of grade crossings, as required to find pre-emption of Easterwood's negligence claim; they merely "establish[ed] the general terms of the bargain between the Federal and State Governments"—states could obtain federal aid if they complied with certain policy guidelines. The Court therefore declined to find pre-emption based "solely on the strength of the general mandates" of Part 924. 507 U.S. at 667-668.

CSX next argued that the language in the Federal Highway Administration's Manual on Uniform Traffic Control Devices for Streets and Highways ("Manual"), 23 C.F.R. §§ 655.601-.603, pre-empted Easterwood's warning device claim. The Court again disagreed. Noting that the Manual itself expressly disavowed any intent to create " 'legal requirement[s]' " for the installation of any particular traffic control devices, 507 U.S. at 669 (quoting Manual at 1A-4), the Court refused to displace state negligence law "by means of an elliptical reference in a Government Manual." *Id.*

The Court viewed the third regulation differently. Promulgated by the Secretary of Transportation pursuant to the Highway Safety Act of 1973, 23 C.F.R. § 646.214 requires that a grade-crossing improvement project include an automatic gate with a flashing light signal (if certain conditions are present at the crossing) *or* receive federal approval, if federal funds "participate in the installation" of the warning devices. *Id.* § 646.214(b)(3), (b)(4). Unlike 23 C.F.R. Part 924 and the Manual, Section 646.214(b) establishes particular federal requirements for warning devices at grade crossings. Where applicable—that is, where federal funds had been used to make improvements at a grade crossing—the regulations therefore "cover[ed] the subject matter" of any state law imposing an independent duty on a railroad to use a particular warning device at the crossing. *Easterwood*, 507 U.S. at 671.

While the *Easterwood* Court found that 23 C.F.R. § 646.214(b)(3) and (b)(4) pre-empted claims of inadequate warning devices at federally-funded grade crossings, no federal funds were used to maintain the crossing involved in the *Easterwood* collision, and so the preemptive regulations were inapplicable on the facts of that case. Easterwood's negligence claim for inadequate warning devices was thus allowed to proceed. 507 U.S. at 673. Easterwood's second negligence claim, however —that the train was traveling at an excessive speed when it reached the crossing—was found to be pre-empted. A federal regulation established maximum operating speeds—variable depending on the class of track—for all freight and passenger trains. *Id.* (citing 49 C.F.R. § 213.9(a) (1992)). Because related safety regulations indicated that the maximum train speeds were set with safety and grade crossing concerns in mind, the maximum-speed regulation covered the subject matter of "train speed with respect to track conditions, including the conditions posed by grade crossings," and thus pre-empted any state law negligence claim based on excessive speed. *Id.* at 675.[11]

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[11] Following *Easterwood*, numerous lower courts have held that the FRSA pre-empted various state law claims. *See Ingram* v. *CSX Transp., Inc.*, 136 F.3d 858, 865 (11th Cir. 1998) (where federal funds are used in grade crossing improvement, inadequate signalization claim pre-empted); *Elrod* v. *Burlington N. R.R.*, 68 F.3d 241 (8th Cir. 1995) (state law negligence claim based on failure to provide adequate warning devices at crossing pre-empted); *Hester* v. *CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995) (state law negligence claims based on inadequate signalization at crossing pre-empted), *cert. denied*, 516 U.S. 1093 (1996); *Cox* v. *Norfolk & W. R.R.*, 998 F. Supp. 679 (S.D. W.Va. 1998) (negligence claim for excessive train speed pre-empted by FRSA); *Williams* v. *Burlington N. R.R.*, 849 F. Supp. 682 (E.D. Ark. 1994) (same). *Compare Southern Pac. Transp. Co.* v. *Public Util. Comm'n of Or.*, 9 F.3d 807, 813 (9th Cir. 1993) (state statute restricting sounding of locomotive whistles at certain times and crossings not pre-empted by FRSA; federal regulations required that locomotive whistles be of a certain decibel level, but did not address subject matter of restrictions on their use).

2. Thus, under *Easterwood,* if regulations promulgated by the Secretary of Transportation "substantially subsume" the subject matter of Mississippi negligence law regarding railroad cars transporting hazardous materials, plaintiffs' claims are pre-empted under the FRSA. *Easterwood,* 507 U.S. at 664. FRSA and HMTA regulations cover the subject matter of every single one of plaintiffs' specific claims against KCS.

The breadth and detail of the applicable FRSA and HMTA regulations are evident upon examination of just two of plaintiffs' claims. Plaintiffs alleged that KCS negligently failed to "properly and adequately inspect the chemical, tank car, facilities and equipment," McKenna Second Am. Complaint ¶ XXXII(a), and failed to "properly maintain and/or repair" the tank car and its component parts. *Id.* XXXII(d).[12] 49 C.F.R. Part 215, promulgated by the Secretary under the FRSA, governs railroad freight car safety standards, including inspections. 49 C.F.R. § 215.11 requires a railroad to designate "persons qualified to inspect railroad freight cars for compliance." Section 215.13 requires the inspector to make a pre-departure inspection "[a]t each location where a freight car is placed in a train," according to the procedure prescribed in Appendix D of Section 215. The procedure in Appendix D requires, "as a minimum," that any freight car "be inspected for the imminently hazardous conditions listed below that are likely to cause an accident or casualty before the train arrives at its destination," including inspecting for any "[b]roken or missing safety appliance[s]," for "[l]ading leaking from a placarded hazardous material car," or for "[a]ny other apparent safety hazard likely to cause an accident or casualty

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[12] The McKenna complaint is the lead complaint in the Mississippi actions, which have been consolidated for pre-trial purposes. All plaintiffs state the same or substantively the same claims against KCS.

before the train arrives at its destination." 49 C.F.R. § 215 App. D.

HMTA regulations impose additional detailed requirements on the qualification, use, and maintenance of tank cars used to ship hazardous materials.[13] A shipper of hazardous materials must determine "to the extent practicable, that the tank, safety appurtenances and fittings are in proper condition for the safe transportation of the lading," and adhere to detailed requirements for loading tanks. 49 C.F.R. § 173.31(b)(1) (1994).[14] Leaking tank cars "must not be offered for transportation until proper repairs have been made." *Id.* Closures of openings in tank cars must be secured "using a bar, wrench, or other suitable tool;" a wrench "having a handle at least 36 inches long must be used to apply the outlet valve cap." *Id.* § 173.31(b)(3). Tank cars of the type used to transport dinitrogen tetroxide must be tested every 10 years, by "completely filling the tank and manway nozzle or expansion dome with water or other liquid of similar viscosity * * * and applying the specified pressure [for dinitrogen tetroxide, 500 p.s.i.] for 10 minutes if the tank is not insulated, or 20 minutes if the tank is insulated." *Id.* § 173.31(c)(2) and Retest Table 1.

49 C.F.R. Part 174, governing inspection of tank cars carrying hazardous materials, requires that each such tank car and each rail car adjacent to it must be inspected "[a]t any point where a train is required to be inspected;" cars may continue in transit "only when the inspection indicates that the cars are in a safe condition for transportation." 49 C.F.R. § 174.8. Each tank car

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[13] HMTA regulations classify dinitrogen tetroxide as a Class 2.3 hazardous chemical. *See* 49 C.F.R. § 172.101.

[14] 49 C.F.R. § 173.31 was revised after the date of the October 1995 chemical release; the language quoted is from the regulation in effect as of that date. The revisions to the regulation do not affect the substantive issue on appeal.

"must be inspected by the carrier before acceptance at the originating point and when received in interchange." *Id.* § 174.9. A tank car "discovered in a leaking condition in transit may not be unnecessarily moved," *id.* § 174.50(a), must be protected against ignition of the liquid or vapor, *id.* § 174.50(b), and must be "stenciled on both sides in letters 7.5 cm (3 inches) in size, adjacent to the car number, 'LEAKY TANK. DO NOT LOAD UNTIL REPAIRED.'" *Id.* § 174.50(d). Procedures for repairs or alterations to tank cars are fully set forth in an appendix to the regulations. *See id.* § 179.6.

The scores of regulations covering the subject matter of plaintiffs' failure-to-inspect and failure-to-repair claims are representative of the regulations covering all of plaintiffs' other claims. In their comprehensiveness and degree of detail, the regulations are directly analogous to the type of regulations held to pre-empt the plaintiff's state law negligence claim in *Easterwood*. Far from the "general mandates" or "elliptical reference[s]" found insufficient to pre-empt state law in *Easterwood, see* 507 U.S. at 668-669, the regulations in fact completely "displace state and private decisionmaking authority" by establishing federal requirements for the transport of hazardous materials, the repair, maintenance, and inspection of tank cars, the hiring and training of hazardous-materials employees, and the procedures for addressing emergency situations. *Id.* at 670. The regulations clearly "substantially subsume" the subject matter of each and every one of plaintiffs' claims against KCS. *Id.* at 664.

3. Because dozens of federal regulations "cover[ed] the subject matter" of each of plaintiffs' claims, the trial court should have dismissed the claims against KCS as pre-empted by the FRSA. It did not. The court's sole rationale for denying KCS's motion for judgment on the pleadings was that plaintiffs had requested damages, a

remedy not available under the FRSA or the HMTA.[15] During argument on KCS's motion, the trial court actually agreed that there were "loads of federal regulations that have to do with what it is this Defendant did and [plaintiffs'] claims against this Defendant." App. 3a. But the court nonetheless concluded that it was "not persuaded that the federal statutes would preempt the state tort law claims," because "while the federal acts may provide some criminal and civil penalties, it would allow that no individual plaintiff would have a remedy for violations of any regulations that are specifically set forth in these acts." App. 5a. The trial court accordingly denied KCS's motion, ruling that plaintiffs should be allowed "the opportunity to pursue a remedy based on state law claims." *Id.*

The trial court's reasoning directly flouts *Easterwood*. If a claim for damages allowed a plaintiff to avoid the FRSA's pre-emption provision, *no* action for damages would ever be pre-empted under the FRSA. *Easterwood* itself gives the lie to that conclusion. *See also Elrod*, 68 F.3d 241; *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559 (10th Cir. 1995). When federal regulations cover the subject matter of a common law tort action, the tort action *may not proceed*, even if—as in *Easterwood*—the plaintiff's claim is for damages.

While state tort law (and the damages available thereunder) may serve different or additional purposes than the federal enforcement scheme, the FRSA expressly instructs that the *subject matter* of plaintiffs' claims governs the FRSA pre-emption inquiry, *not* the purpose of the state tort law regime. 49 U.S.C. § 20106. The test for pre-emption under the FRSA is straightforward: if fed-

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[15] *See Abate* v. *Southern Pac. Transp. Co.*, 928 F.2d 167, 170 (5th Cir. 1991) (no compensatory or punitive damages available under the FRSA); *see also Borough of Ridgefield* v. *New York Susquehanna & W. R.R.*, 810 F.2d 57, 60 (3d Cir. 1987) (no compensatory or punitive damages available under the HMTA).

eral railroad safety regulations cover the subject matter of a state law, the state law is pre-empted, no matter what purpose that law purports to advance. *See Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963) (in implied pre-emption analysis, test is "whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives"); *Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. 88, 105 (1992) ("In assessing the impact of a state law on the federal scheme, we have refused to rely solely on the legislature's professed purpose and have looked as well to the effects of the law.").

Confining the FRSA pre-emption inquiry to subject matter, not purpose, is sound practice: as other courts have noted, the *effect* of superimposing state tort liability on an extensive federal regulatory scheme is exactly the same as superimposing any other state-created statutory or regulatory standard, despite the sometimes divergent purposes of state tort law and a federal regulatory scheme. Compensation in tort is awarded when a defendant has been found liable in tort; that finding is necessarily based upon the conclusion that the defendant has violated some state-created standard of care. *See San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("[State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *Law* v. *General Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997) (liability in tort "induce[s] defendants to conform their conduct to a standard of care established by the state"); *Ouelette* v. *Union Tank Car Co.*, 902 F. Supp. 5, 10 (D. Mass. 1995) (tort actions, if allowed, would "generate precisely those inconsistencies in railroad safety standards that Congressional action was intended to avoid," because rail-

roads would "inevitably be subjected to varying interpretations of the federal regulations in different states").

The two regimes cannot coexist in this case. States have a role in enforcing railroad safety, but that role is prescribed and delimited by the FRSA. The fact that state tort damages may provide compensation otherwise unavailable to plaintiffs under the federal scheme provides no justification for permitting states to supplement established federal standards with their own. "[E]ven state regulation designed to protect vital state interests must give way to paramount federal legislation." *De Canas* v. *Bica*, 424 U.S. 351, 357 (1976). The Mississippi trial court's refusal to dismiss plaintiffs' claims against KCS on pre-emption grounds was clear error under *Easterwood*.[16]

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[16] This Court has also suggested that circumstances exist where, despite the existence of an express pre-emption provision, a court may still perform implied pre-emption analysis to find a state law pre-empted. *Freightliner* v. *Myrick*, 514 U.S. 280, 288 (1995). But the Court has yet to clarify *when* a court may look beyond an express pre-emption provision to find implied pre-emption. This case presents an opportunity to resolve that question. Even if not expressly pre-empted by the FRSA, plaintiffs' claims are impliedly pre-empted. State requirements are impliedly pre-empted where they frustrate Congress's objectives. *See, e.g., Gade* v. *National Solid Wastes Management Ass'n*, 505 U.S. at 98; *English* v. *General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Allowing state tort actions against railroads for their alleged failure properly to transport hazardous materials by rail opens the industry up to 50 different state standards of care, and to liability based not on the judgment of the federal government as to what standards the railroad must meet, but instead on the individualized and disparate judgments of thousands of state-court juries. Federal regulation has pervaded the railroad industry for a hundred years; particularly under the FRSA, where Congress has *expressly* stated its intent that railroad safety be regulated on a national level, state tort claims raising safety issues regulated to the last detail by federal authorities pose a very real risk of undermining the entire federal regulatory scheme, and frustrate the "accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). This Court should grant certiorari to clarify in what circumstances a court may look beyond express pre-emption provisions and find implied pre-emption.

The trial court's ruling contradicts *Easterwood* on another ground as well. Because the court erroneously concluded that plaintiffs' request for damages circumvented the FRSA pre-emption statute, it did not address plaintiffs' claims individually. But to determine whether a complaint containing multiple claims is pre-empted under the FRSA, a court must examine each individual claim to determine whether federal regulations cover the subject matter of that claim. *Easterwood*, 507 U.S. at 665; *see also Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 523-524 (1992) (Court's pre-emption analysis addressed "each category of damages actions in turn"); *Easterwood* v. *CSX Transp., Inc.*, 933 F.2d 1548, 1553 (11th Cir. 1991) (task in FRSA pre-emption case is to "examine each claim and determine if any federal regulations have been promulgated which cover the conduct at issue"), *aff'd*, 507 U.S. 658 (1993). Plaintiffs' individual claims against KCS involve several different subject matters: the transportation of hazardous materials, inspection of tank cars, hiring and training of hazardous-materials employees, and proper public-sector notification and emergency procedures. These are all distinct subject matters under the FRSA, and all should have been analyzed separately under *Easterwood*.

But the trial court did not examine *any* of plaintiffs' specific claims in this case. Instead, while acknowledging that "loads of federal regulations" dealt with the subject matter of plaintiffs' claims, the court issued a blanket ruling allowing each claim to go forward on the strength of plaintiffs' claim for damages alone. This was legal error. It contradicts *Easterwood*, greatly prejudiced KCS, and should be corrected before KCS is compelled to endure years of boundless, duplicative and competing litigations in state court.

## II. THE QUESTION PRESENTED IS IMPORTANT AND SHOULD BE DECIDED BY THIS COURT

The conflict between the decisions of the Mississippi courts below and this Court's decision in *Easterwood* provides a compelling basis for review, but the need for certiorari is heightened still further by the importance of the issue at hand. KCS transported a rail car for forty miles, two weeks before and a hundred miles distant from the Bogalusa chemical release. Despite its obviously minimal role and removal in time from the Bogalusa accident, KCS finds itself a defendant in thousands of individual suits in Mississippi state court *and* a massive class action lawsuit in Louisiana state court. Without this Court's intervention, KCS will be forced to expend millions of dollars to defend itself in endless—and duplicative—trials, against thousands of plaintiffs with claims that are clearly pre-empted by the FRSA.

KCS's plight illustrates exactly why Congress concluded that railroad safety standards were best enforced by the federal government. As things now stand, two separate juries in two separate states will pass judgment on whether KCS complied with its duties under each state's disparate negligence and punitive damages standards. This is precisely the sort of situation Congress anticipated when it declined to "subject[] the national rail system to a variety of enforcement in 50 different judicial and administrative systems" and instead enacted the FRSA with its express pre-emption provision. H.R. Rep. No. 91-1194, at 11. The Mississippi and Louisiana litigations against KCS threaten substantially to undermine the uniform regulatory scheme Congress envisioned—and required—with the passage of the FRSA. This Court should grant certiorari to review the decisions below allowing these state court actions to proceed in the face of the compelling need for uniform federal regulation.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDICES

## APPENDIX A

[Filed Jun. 22, 1998]

## IN THE SUPREME COURT OF MISSISSIPPI

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No. 97-M-01181

IN RE: BOGALUSA CHEMICAL RELEASE

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### ORDER

This matter has come before a panel of the Court consisting of Sullivan, P.J., Roberts, and Mills, JJ. on the Petition for Interlocutory Appeal filed by Kansas City Southern Railway Company, and having considered same, the panel finds the Petition is not well-taken and that it should be denied.

IT IS THEREFORE ORDERED that the Petition for Interlocutory Appeal filed by Kansas City Southern Railway Company is denied.

SO ORDERED, this, the 20th day of May, 1998.

/s/ Michael P. Mills
MICHAEL P. MILLS
Justice

**APPENDIX B**

IN THE CIRCUIT COURT
OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

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No. 251-96-493 All Cases

IN RE BOGALUSA CHEMICAL RELEASE

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ORDER

THIS DAY came on for hearing the Motion for Judgment on the Pleadings and *ore tenus* Motion for Certification of Interlocutory Appeal Pursuant to Rule 5(a) of the Mississippi Rules of Appellate Procedure of Defendant, The Kansas City Southern Railway Company. The Court, having considered the Motions, supporting memorandum and the argument of counsel and being fully advised in the premises, finds that the Motions are not well taken, the relief sought should be denied and that the factors set forth in Rule 5(a) of the Mississippi Rules of Appellate Procedure are not applicable such as to justify certifying this matter for interlocutory appeal.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion for Judgment on the Pleadings of the Defendant, The Kansas City Southern Railway Company, is denied.

IT IS FURTHER ORDERED AND ADJUDGED that the *ore tenus* Motion for Certification for Interlocutory Appeal of this Court's order denying The Kansas City Southern Railway Company's Motion for Judgment on the Pleadings is denied.

SO ORDERED, this the 22 day of September, 1997.

By: /s/ James E. Graves, Jr.
Circuit Court Judge

## APPENDIX C

CIRCUIT COURT
OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

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No. 251-96-000493, All Cases

IN RE: BOGALUSA CHEMICAL RELEASE

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TRANSCRIPT OF PROCEEDINGS

Date: August 22, 1997

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BEFORE: HON. JAMES E. GRAVES, JR.

* * * *

[29] BY THE COURT: Let me tell you where I am, Mr. Luke, and you may be able [to] convince me that I have no business being there, but here's where I am. I don't think there's much argument that there are loads of federal regulations that have to do with what it is this Defendant did and their claims against this Defendant. But apparently everybody concedes that the state's tort law is the only remedy that would be available to the Plaintiffs in the event your client violated these regulations. Which is to say that the FRSA [30] and then the other act dealing with hazardous materials transportation clearly set forth all the regulations in terms of how you're supposed to handle it and what you're supposed to do. But they just don't bother to provide what the remedy is for an individual plaintiff if one of these regulations gets violated.

And doesn't it stand to reason if they're going to say all that, they could have said and when this happens their exclusive remedy is this. I guess the same argument that you're using that says it is so all-encompassing seems to

me to be the best one for the Plaintiffs to say, well, if they said all that then they could have said everything else they wanted to say, which is there is no other remedy, this is the inclusive remedy, we expressly preempt any state tort claim law. Do you see what I'm saying? When you're that comprehensive, it's all the more reason that I should presume that they said everything they meant to say and whatever they didn't say, they didn't mean to deal with it.

I may be oversimplifying the whole thing which I'm guilty of doing a lot because I just need to keep it simple for me, but it just seems to me that when they addressed all of that, then they could have gone ahead and said what you needed them to say so they couldn't bring these claims.

[31] MR. LUKE: Your Honor, that is the argument that is made and that's the argument that's made everywhere. That argument has been—

THE COURT: It's been tried and lost, right?

MR. LUKE: —the Liggett case, the cigarette case, it's been done in that, and on and on. In every one, they always say that. But if we were writing on a blank sheet of paper here tha. might be an argument you could use, but the Supreme Court which is the final arbiter of what the congressional intent is has said—they were talking about one of the exceptions was that the common law of negligence should be allowed and that was not preempted, and this is what the Supreme Court says.

It says the common law of negligence provides a general rule to address all hazards caused by lack of due care, not just those owing to unique local conditions. Then it talks about the respondents who were the plaintiffs in this case. Their view would completely deprive the Secretary of the power to preempt state common law, a power clearly conferred by Section 434.

The Supreme Court has already said that if the regulation covers the subject matter, state law, whether it's a regulation, common law, tort claim; it's preempted. In

*Easterwood*, the claim that was preempted there was a state common law tort action at a crossing accident. If the Supreme Court had not ruled on that, then maybe that argument would be valid. But the Supreme Court has already said it doesn't matter. We understand there's not a private remedy here but Congress intended to allow the [32] Secretary to preempt state common law by passing these regulations. Without dispute, the regulations covering the subject matter of this have been passed and the Supreme Court has already made the ruling for us. The Supreme Court has already said common law tort actions are preempted.

* * * *

And the reason there's no remedy under FRSA is because it specifically reserved the right for all enforcement activity to be done by the Federal government, by the Secretary, for both penalties, fines, and criminal prosecutions. So Congress was clear. They said we're passing this law and if there's a state law on that issue, it's gone.
* * *

* * * *

[39] THE COURT: [T]he pleadings reflect that the nature of the claims raised by this Plaintiff and the breadth of the claims raised by this Plaintiff are such that the Court is not persuaded that the federal statutes would preempt the state tort law claims. Even more particularly, it is conceded that while the federal acts may provide some criminal and civil [40] penalties, it would allow that no individual plaintiff would have a remedy for violations of any regulations that are specifically set forth in these acts.

The Court is persuaded that where the state law does provide a remedy, does provide that a plaintiff can maintain a claim, that certainly based on the pleadings the Court is not persuaded that the Plaintiff should at this juncture be denied the opportunity to pursue a remedy based on state law claims. Hence, the Court determines that the motion for judgment on the pleadings should be and is hereby denied.

* * * *

## APPENDIX D

## PERTINENT STATUTORY PROVISIONS

### Federal Railroad Safety Act

49 U.S.C. § 20101 provides:

**§ 20101. Purpose**

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

* * * *

49 U.S.C. § 20103 provides in pertinent part:

**§ 20103. General authority**

(a) REGULATIONS AND ORDERS.—The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.

(b) REGULATIONS OF PRACTICE FOR PROCEEDINGS.—The Secretary shall prescribe regulations of practice applicable to each proceeding under this chapter. The regulations shall reflect the varying nature of the proceedings and include time limits for disposition of the proceedings. The time limit for disposition of a proceeding may not be more than 12 months after the date it begins.

(c) CONSIDERATION OF INFORMATION AND STANDARDS.—In prescribing regulations and issuing orders under this section, the Secretary shall consider existing relevant safety information and standards.

* * * *

49 U.S.C. § 20105 provides in pertinent part:

**§ 20105. State participation**

(a) INVESTIGATIVE AND SURVEILLANCE ACTIVITIES.—The Secretary of Transportation may prescribe investigative and surveillance activities necessary to enforce the safety regulations prescribed and orders issued by the Secretary that apply to railroad equipment, facilities, rolling stock, and operations in a State. The State may participate in those activities when the safety practices for railroad equipment, facilities, rolling stock, and operations in the State are regulated by a State authority and the authority submits to the Secretary an annual certification as provided in subsection (b) of this section.

(b) ANNUAL CERTIFICATION.—(1) A State Authority's annual certification must include—

(A) a certification that the authority—

(i) has regulatory jurisdiction over the safety practices for railroad equipment, facilities, rolling stock, and operations in the State;

(ii) was given a copy of each safety regulation prescribed and order issued by the Secretary, that applies to the equipment, facilities, rolling stock, or operations, as of the date of certification; and

(iii) is conducting the investigative and surveillance activities prescribed by the Secretary under subsection (a) of this section; and

(B) a report, in the form the Secretary prescribes by regulation, that includes—

(i) the name and address of each railroad carrier subject to the safety jurisdiction of the authority;

(ii) each accident or incident reported during the prior 12 months by a railroad carrier involving a fatality, personal injury requiring hospitalization, or property damage of more than $750 (or a higher amount prescribed by the Secretary), and a summary of the authority's investigation of the cause and circumstances surrounding the accident or incident;

(iii) the record maintenance, reporting, and inspection practices conducted by the authority to aid the Secretary in enforcing railroad safety regulations prescribed and orders issued by the Secretary, including the number of inspections made of railroad equipment, facilities, rolling stock, and operations by the authority during the prior 12 months; and

(iv) other information the Secretary requires.

(2) An annual certification applies to a safety regulation prescribed or order issued after the date of the certification only if the State authority submits an appropriate certification to provide the necessary investigative and surveillance activities.

(3) If, after receipt of an annual certification, the Secretary decides the State authority is not complying satisfactorily with the investigative and surveillance activities prescribed under subsection (a) of this section, the Secretary may reject any part of the certification or take other appropriate action to achieve adequate enforcement. The Secretary must give the authority notice and an opportunity for a

hearing before taking action under this paragraph. When the Secretary gives notice, the burden of proof is on the authority to show that it is complying satisfactorily with the investigative and surveillance activities prescribed by the Secretary.

49 U.S.C. § 20106 provides:

**§ 20106. National uniformity of regulation**

Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order—

(1) is necessary to eliminate or reduce an essentially local safety hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20111 provides in pertinent part:

**§ 20111. Enforcement by the Secretary of Transportation**

(a) EXCLUSIVE AUTHORITY.—The Secretary of Transportation has exclusive authority—

(1) to impose and compromise a civil penalty for a violation of a railroad safety regulation prescribed or order issued by the Secretary;

(2) except as provided in section 20113 of this title, to request an injunction for a violation of a railroad safety regulation prescribed or order issued by the Secretary; and

(3) to recommend appropriate action be taken under section 20112(a) of this title.

(b) COMPLIANCE ORDERS.—The Secretary may issue an order directing compliance with this part or with a railroad safety regulation prescribed or order issued under this part.

(c) ORDERS PROHIBITING INDIVIDUALS FROM PERFORMING SAFETY-SENSITIVE FUNCTIONS.—If an individual's violation of this chapter or any of the laws transferred to the jurisdiction of the Secretary of Transportation by subsection (e)(1), (2), and (6)(A) of section 6 of the Department of Transportation Act, as in effect on June 1, 1994, or a regulation prescribed or order issued by the Secretary under this chapter is shown to make that individual unfit for the performance of safety-sensitive functions, the Secretary, after notice and opportunity for a hearing, may issue an order prohibiting the individual from performing safety-sensitive functions in the railroad industry for a specified period of time or until specified conditions are met. This subsection does not affect the Secretary's authority under section 20104 of this title to act on an emergency basis.

(d) REGULATIONS REQUIRING REPORTING OF REMEDIAL ACTIONS.—(1) The Secretary shall prescribe regulations to require that a railroad carrier notified by the Secretary that imposition of a civil penalty will be recommended for a failure to comply with this part, chapter 51 or 57 of this title, or a regulation prescribed or order issued under any of those provisions, shall report to the Secretary, not later than the 30th day after the end of the month in which the notification is received—

(A) actions taken to remedy the failure; or

(B) if appropriate remedial actions cannot be taken by that 30th day, an explanation of the reasons for the delay.

49 U.S.C. § 20112 provides in pertinent part:

**§ 20112. Enforcement by the Attorney General**

(a) CIVIL ACTIONS.—At the request of the Secretary of Transportation, the Attorney General may bring a civil action in a district court of the United States—

(1) to enjoin a violation of, or to enforce, a railroad safety regulation prescribed or order issued by the Secretary;

(2) to collect a civil penalty imposed or an amount agreed on in compromise under section 21301 of this title; or

(3) to enforce a subpena issued by the Secretary under this chapter.

49 U.S.C. § 20113 provides in pertinent part:

**§ 20113. Enforcement by the States**

(a) INJUNCTIVE RELIEF.—If the Secretary of Transportation does not begin a civil action under section 20112 of this title to enjoin the violation of a railroad safety regulation prescribed or order issued by the Secretary not later than 15 days after the date the Secretary receives notice of the violation and a request from a State authority participating in investigative and surveillance activities under section 20105 of this title that the action be brought, the authority may bring a civil action in a district court of the United States to enjoin the violation. This subsection does not apply if the Secretary makes an affirmative

written finding that the violation did not occur or that the action is not necessary because of other enforcement action taken by the Secretary related to the violation.

(b) IMPOSITION AND COLLECTION OF CIVIL PENALTIES.—If the Secretary does not impose the applicable civil penalty for a violation of a railroad safety regulation prescribed or order issued by the Secretary not later than 60 days after the date of receiving notice from a State authority participating in investigative and surveillance activities under section 20105 of this title, the authority may bring a civil action in a district court of the United States to impose and collect the penalty. This paragraph does not apply if the Secretary makes an affirmative written finding that the violation did not occur.

## Hazardous Materials Transportation Act

49 U.S.C. § 5101 provides:

### § 5101. Purpose

The purpose of this chapter is to provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation.

* * * *

49 U.S.C. § 5103 provides:

### § 5103. General regulatory authority

(a) DESIGNATING MATERIAL AS HAZARDOUS.—The Secretary of Transportation shall designate material (including an explosive, radioactive material, etiologic agent, flammable or combustible liquid or solid, poison, oxidizing or corrosive material, and compressed gas) or a group or class of material as hazardous when the Secretary decides that transporting the material in commerce in a particular amount and form may pose an unreasonable risk to health and safety or property.

(b) REGULATIONS FOR SAFE TRANSPORTATION.—(1) The Secretary shall prescribe regulations for the safe transportation of hazardous material in intrastate, interstate, and foreign commerce. The regulations—

(A) apply to a person—

(i) transporting hazardous material in commerce;

(ii) causing hazardous material to be transported in commerce; or

(iii) manufacturing, fabricating, marking, maintaining, reconditioning, repairing, or testing a packaging or a container that is represented, marked, certified, or sold by that person as qualified for use in transporting hazardous material in commerce; and

(B) shall govern safety aspects of the transportation of hazardous material the Secretary considers appropriate.

(2) A proceeding to prescribe the regulations must be conducted under section 553 of title 5, including an opportunity for informal oral presentation.

* * * *

49 U.S.C. § 5106 provides:

**§ 5106. Handling criteria**

The Secretary of Transportation may prescribe criteria for handling hazardous material, including—

(1) a minimum number of personnel;

(2) minimum levels of training and qualifications for personnel;

(3) the kind and frequency of inspections;

(4) equipment for detecting, warning of, and controlling risks posed by the hazardous material;

(5) specifications for the use of equipment and facilities used in handling and transporting the hazardous material; and

(6) a system of monitoring safety procedures for transporting the hazardous material.

* * * *

49 U.S.C. § 5122 provides:

**§ 5122. Enforcement**

(a) GENERAL.—At the request of the Secretary of Transportation, the Attorney General may bring a civil action in an appropriate district court of the United States to enforce this chapter or a regulation prescribed or order issued under this chapter. The court may award appropriate relief, including punitive damages.

(b) IMMINENT HAZARDS.—(1) If the Secretary has reason to believe that an imminent hazard exists the Secretary may bring a civil action in an appropriate district court of the United States—

(A) to suspend or restrict the transportation of the hazardous material responsible for the hazard; or

(B) to eliminate or ameliorate the hazard.

(2) On request of the Secretary, the Attorney General shall bring an action under paragraph (1) of this subsection.

49 U.S.C. § 5123 provides:

**§ 5123. Civil penalty**

(a) PENALTY.—(1) A person that knowingly violates this chapter or a regulation prescribed or order issued under this chapter is liable to the United States Government for a civil penalty of at least $250 but not more than $25,000 for each violation. A person acts knowingly when—

(A) the person has actual knowledge of the facts giving rise to the violation; or

(B) a reasonable person acting in the circumstances and exercising reasonable care would have that knowledge.

(2) A separate violation occurs for each day the violation, committed by a person that transports or causes to be transported hazardous material, continues.

(b) HEARING REQUIREMENT.—The Secretary of Transportation may find that a person has violated this chapter or a regulation prescribed under this chapter only after notice and an opportunity for a hearing. The Secretary shall impose a penalty under this section by giving the person written notice of the amount of the penalty.

(c) PENALTY CONSIDERATIONS.—In determining the amount of a civil penalty under this section, the Secretary shall consider—

(1) the nature, circumstances, extent, and gravity of the violation;

(2) with respect to the violator, the degree of culpability, any history of prior violations, the ability to pay, and any effect on the ability to continue to do business; and

(3) other matters that justice requires.

(d) CIVIL ACTIONS TO COLLECT.—The Attorney General may bring a civil action in an appropriate district court of the United States to collect a civil penalty under this section.

(e) COMPROMISE.—The Secretary may compromise the amount of a civil penalty imposed under this section before referral to the Attorney General.

(f) SETOFF.—The Government may deduct the amount of a civil penalty imposed or compromised under this section from amounts it owes the person liable fo. the penalty.

(g) DEPOSITING AMOUNTS COLLECTED.—Amounts collected under this section shall be deposited in the Treasury as miscellaneous receipts.

49 U.S.C. § 5124 provides:

**§ 5124. Criminal penalty**

A person knowingly violating section 5104(b) of this title or willfully violating this chapter or a regulation prescribed or order issued under this chapter shall be fined under title 18, imprisoned for not more than 5 years, or both.

49 U.S.C. § 5125 provides in pertinent part:

**§ 5125. Preemption**

(a) GENERAL.—Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if—

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

(b) SUBSTANTIVE DIFFERENCES.—(1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter, is preempted:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

(2) If the Secretary of Transportation prescribes or has prescribed under section 5103(b), 5104, 5110, or 5112 of this title or prior comparable provision of law a regulation or standard related to a subject referred to in paragraph (1) of this subsection, a State, political subdivision of a State, or Indian tribe may prescribe, issue, maintain, and enforce only a law, regulation, standard, or order about the subject that is substantively the same as a provision of this chapter or a regulation prescribed or order issued under this chapter. The Secretary shall decide on and publish in the Federal Register the effective date of section 5103(b) of this title for any regulation or standard about any of those subjects that the Secretary prescribes after November 16, 1990. However, the effective date may not be earlier than 90 days after the Secretary prescribes the regulation or standard nor later than the last day of the 2-year period beginning on the date the Secretary prescribes the regulation or standard.

(2)

No. 98-479

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SUPREME COURT, U.S.

In The

# Supreme Court of the United States

October Term, 1998

KANSAS CITY SOUTHERN RAILWAY COMPANY,

*Petitioner,*

v.

CHARLOTTE McKENNA, *ET AL.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Circuit Court Of Hinds County, Mississippi, First Judicial District**

## RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

On October 23, 1995, a railroad tank car (UTLX 82329) containing liquid dinitrogen tetroxide, more commonly referred to as nitrogen tetroxide, ruptured and exploded on the premises of Gaylord Chemical Corporation in Bogalusa, Louisiana. The tank car was owned by Union Tank Car Company and leased to Gaylord Chemical.

Plaintiffs, constituting specific residents of Louisiana and Mississippi who were exposed to the highly toxic chemicals emanating from the rupture/explosion, filed suit against various defendants in the First Judicial District of Hinds County, Mississippi. With respect to Petitioner, Kansas City Southern Railway Company, Respondents alleged various state-law claims of negligence and strict liability based upon the conduct of the Defendant. More particularly, Respondents allege:

- That UTLX 82329 was transported in interstate commerce from Vicksburg to Jackson, Mississippi, by Petitioner in October, 1995. At all times material, UTLX 82329 weighed in excess of 9,000 pounds above its maximum weight on rail.

- That the transportation by Petitioner of UTLX 82329 violated *Field Manual of Interchange Rules* Nos. 89, 91, 92, and 98 adopted by the Association of American Railroads, since the car was in excess of its maximum weight on rail.

- That the transportation by Petitioner of UTLX 82329 violated various regulations of the Department of Transportation including,

but not limited to, 49 CFR 100, *et seq.*, as well as, 49 CFR Part 215, *et seq.*

- At all times material, Petitioner knew that UTLX 82329 weighed in excess of its maximum weight on rail.
- That Petitioner had the ability at all times material to inspect UTLX 82329. That a competent inspection by Petitioner would have disclosed the defective condition of UTLX 82329.
- That the Federal Regulations identified herein are minimum standards under which Petitioner is expected to operate.
- That the transportation of a hazardous material car, such as UTLX 82329, with a weight in excess of its maximum weight on rail, presents a clear and present danger to the safety and welfare of the public, and constitutes wanton or reckless disregard for public safety.

Pursuant to Mississippi Rules of Civil Procedure, Rule 12(c), Petitioner filed a Motion for Judgment on the Pleadings alleging that Respondents' state-law-based negligence and strict liability claims were expressly preempted by the Federal Railroad Safety Act ("FRSA"), by the Federal Hazardous Materials Transportation Act ("HMTA"), and by regulations issued pursuant to these statutes. The Trial Court correctly denied Petitioner's motion, finding that there was no express preemption and further that the legislation and regulations did not substantially subsume the subject matter. Specifically, the Trial Court was concerned by the fact that discovery was on-going and that all of the myriad of allegations made

by the Plaintiffs were not preempted by federal regulation. The Trial Court also expressed concern that Congress would not have intended to prohibit state law tort claims by individuals for all negligent conduct of railroad companies. The Supreme Court of Mississippi on May 20, 1994 denied Petitioner's Petition for Interlocutory Appeal.

The issue of law being raised by Petitioner is essentially whether the Plaintiffs' claims are preempted by the Federal Railroad Safety Act ("FRSA") and the Hazardous Materials Transportation Act ("HMTA"). The Trial Court correctly determined that neither Act preempts the claims in the current litigation. Thus, the Trial Court's determination is consistent with applicable law and there exists no substantial basis for further consideration of this issue by this Court.

## ARGUMENT

Congress did not expressly preempt state common-law tort claims for injuries that resulted from accidents like those in the instant case. In the absence of such clear and express language, the burden is on Petitioner to show that Congress intended to preclude Respondents from bringing state common-law claims. *Silkwood v. Kerr-McGee Com.*, 464 U.S. 238, 255 (1984). *"Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted." Id.* (emphasis added).

In light of the fact that Congress did not expressly preempt state causes of action such as the one herein, any analysis under the supremacy clause begins with the basic presumption that Congress did not intend to displace state law. *CXS Transp., Inc. v. Easterwood,* 113 S.Ct. 1732, 1737 (1993); *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981). The presumption against preemption is heightened where the federal law would have the effect of barring a state from exercising its traditional police powers. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 144 (1963). Likewise, the presumption against preemption "is particularly apt" where railroad safety is involved. *Rogers v. Consolidated Rail Corp.,* 948 So.2d 858, 859 (2d Cir. 1991). Where preemption would infringe on a historic police power of the states, courts are advised to *"start with the assumption that the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Torts, such as those alleged by the Respondents in this case, based upon state common-law principles of nuisance, negligence, trespass, and strict liability, are precisely the sort of legal actions that fall within the scope of Mississippi's historical and prototypical powers. These claims are perhaps the best example of a subject which is "traditionally governed by state law." *In re Miamisburg Train Derailment Litigation,* 626 N.E.2d 85, 90 (1994). Significantly, the presumption against preemption of these causes of action is strengthened where the preemption would leave the Respondents without an adequate remedy for violations of their state created rights. See *Silkwood,* 464 U.S. at 256-57; see also *Cincinnati Metro. Hous.*

*Auth. v. State Employment Relations Bd.*, 560 N.E.2d 179, 53 Ohio St. 3d 221, 224 (Ohio 1990) (stating that *"when the subject matter of state law is within the historical police powers of the state, it is presumed that the state law was not intended to be superseded by federal regulation").* Thus, Petitioner's present application must be evaluated in light of the strong presumption against preemption.

The recent decision of this Court in *Medtronic, Inc. v. Lohr,* 116 S.Ct. 2240 (1996) makes clear that even express preemptive language is narrowly construed. In *Medtronic,* interpreting statutes (the Medical Device Amendments) that expressly preempt state law, the Court found that it "long presumed that Congress does not cavalierly preempt state-law causes of action" and would not find that state law was preempted "unless that was the clear and manifest purpose of Congress." *Medtronic, supra* at 2250.

The key question in preemption analysis is whether Congress intended for state law to be displaced or superseded by federal law. *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617 (1992). Petitioner cast its arguments that there is preemption in this case on its assertions that the extensive nature of the regulations establishes that Congress impliedly intended to preempt state law tort claims by enacting the FRSA. However, where a statute contains an express preemption clause, an examining court must focus on the plain wording of the preemption clause as the best indicator of the scope of Congressional intent. *Easterwood,* 113 S.Ct. at 1732. A court should resort to principles of implied preemption **only** when Congress has been silent with respect to preemption. *Cipollone,* 112 S.Ct. at 2625 (concurring opinion) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)); *In re Miamisburg Train*

*Derailment Litig.*, 626 N.E.2d 85, 90 (Ohio Sup.Ct. 1994), *cert. denied sub nom Union Tank Car Co. v. Various Plaintiffs in Class*, 115 S.Ct. 59, 130 L.Ed.2d 17 (1994) (stating that *"[s]ince the FRSA contains an express preemption clause, Section 434, there is no need to look beyond the text of that clause to determine if Congress intended for appellants claims to be preempted"*). If Congress had intended to preempt state law tort claims under the FRSA, it could have simply incorporated such a statement into the relevant statutes or regulations. However, Congress didn't do this.

The express preemption provision of the FRSA states:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force ***a law, regulation, or order related to railroad safety*** until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the *State requirement*. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order –
>
> > (1) is necessary to eliminate or reduce an essentially local safety hazard;
> >
> > (2) is not incompatible with a law, regulation, or order of the United States Government; and
> >
> > (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106 (emphasis added).

Courts that have examined the legislative intent behind the FRSA have concluded that Congress intended only to preempt the right of a state to *directly* regulate rail

transportation. Petitioner wishes to have this Court find preemption based on the fact that the regulations promulgated under FRSA and the HMTA indicate minimum safety standards in some cases. However, compliance with minimum federal safety standards does not necessarily shield a defendant from liability for its tortious acts. This Court, the same year as *Easterwood*, recognized this principle in *Hatfield v. Burlington Northern R.R. Co.*, 958 F.2d 320 (10th Cir. 1992), *vacated and remanded*, 113 S.Ct. 1940 (1993), wherein it held that state tort law can be compatible with federal regulation and stated that *"the scheme of negligence liability could just as easily complement the regulations."* 113 S.Ct. at 1739. Likewise, as the *Cipollone* plurality stated, "there is not a general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common law damage actions." 505 U.S. at 518. Congress does not always intend, merely by enacting a statutory scheme, to preempt citizens from bringing actions based on common-law tort theories. **In fact, absent express preemption, there is a strong presumption to the contrary.**[1]

Courts that have considered the issue of preemption even at the summary judgment phase of the litigation have found that state law tort claims such as those asserted by Respondents are not preempted by the FRSA.

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[1] In any event, there is no basis for Petitioner to succeed in its interlocutory appeal or on its motion for judgment on the pleadings in the Trial Court absent a factual showing that it did comply with all applicable federal regulations. This is a factual issue that certainly cannot be resolved via a judgment on the pleadings or by this Court on writ practice.

For example, in *In re Miamisburg Train Derailment Litigation*, the Supreme Court of Ohio, using *Easterwood* as a road map, considered preemption claims nearly identical to those in this case. 626 N.E.2d at 85. In *In re Miamisburg*, the plaintiffs brought suit against a railroad, the shipper of hazardous materials and the tank car company (among others) for damages incurred when the rail car containing the hazardous materials ruptured in a derailment (after falling from a bridge) sending up a cloud of dangerous material and causing ***"mass evacuation of the surrounding area due to the potentially toxic effects of . . . cloud."*** *Id.* at 86. The defendants sought summary judgment, claiming that the plaintiffs' *"common-law tort claims were preempted by the federal regulations governing tank car specifications."* *Id.* at 87. The *In re Miamisburg* court found that the FRSA did not preempt all common-law tort claims.

The Ohio Supreme Court also followed the analysis applied in *Easterwood*, seeking to determine whether the regulations applicable to the defendants ***"cove[r] the subject matter of the plaintiffs' tort claims"*** pertaining to tank car specifications. *In re Miamisburg*, at 92-95. *"To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they 'touch upon' or 'relate to' that subject matter."* *Easterwood*, 113 S.Ct. at 1738. The common-law tort claims will only be preempted if the *"federal regulations* ***substantially subsume*** *the subject matter of the relevant state law."* *Id.* (emphasis added). The *In re Miamisburg* court went on to state that the *"applicable preemption provision must be read narrowly 'in light of the presumption against preemption of state police power regulations.' "* 626 N.E.2d at 92 (quoting *Cipollone*, 112 S.Ct. at 2618).

The Ohio Supreme Court applied the *Easterwood* methodology to the regulations at issue and determined that the regulations did not cover the subject matter that was the substance of the claims and thus, did not pre-empt state tort law. *In re Miamisburg*, 626 N.E.2d at 93. There, the defendants claimed that the regulation at issue which allowed older tank cars to be used without a reinforcement device *"cover[ed] the subject matter"* brought up in the tort claims. *Id.* The court stated:

> The mere general provision of [the regulation] that tanks mounted on or forming part of a tank car "built to specifications predating those in this part may continue in use" is not equivalent to an affirmative specific statement that the owner or operator of a tank car built prior to 1971 is under no duty to retrofit with reinforcing pads; and is also not equivalent to the further specific statement that one who does not retrofit a pre-1971 built tank car with reinforcing pads is shielded from liability under state tort law.

*Id.* Basically, the court found that the lack of specificity in the regulations which the defendants claimed *"covered the subject matter"* of the plaintiffs' claims indicated a lack of intent to preempt common-law claims. *Id.* Thus, the Supreme Court of Ohio found that the state law tort claims were not preempted. This Court should follow that same rationale.

In *In Re: New Orleans Train Car Leakage Fire Litigation*, the Fourth Circuit Court of Appeals of Louisiana, was confronted with facts similar to the facts now before the Court. *In Re: New Orleans Train Car Leakage Fire Litigation*, 671 So.2d 540 (1996). There, Illinois Central Railroad Co. received a fully loaded tank car, and transported the tank

car to Jefferson Parish where it was turned over to New Orleans Terminal Company (NOTC). NOTC delivered the tank car to CSX's interchange track in New Orleans on the morning of September 8, 1987. The tank car exploded the following day. Defendants, Illinois Central Railroad, NOTC, and CSX claimed they had no liability because plaintiffs' state law claims were preempted by the Federal Railroad Safety Act. The court rejected defendants' arguments, holding that *Easterwood* did not bar a suit for breach of state law tort duties.

> FRSA does not preempt the provisions of La. C.C. art. 2315.3 [Louisiana's state law punitive damages statute relating to the transportation or storage of hazardous substances] . . . Like the HMTA, the penalty provisions of the FRSA provide for fines and penalties to be paid to the federal government, not to the individual persons injured as a result of the improper storage, handling, or transportation of hazardous materials . . . the fines and penalties of the two provisions have different purposes.

*In Re: New Orleans Tank Car Leakage*, 671 So.2d at 546. The court found that the statute does not address the regulatory and enforcement authority of the Secretary of Transportation nor does it seek to designate materials as hazardous, it "merely sets forth a cause of action for exemplary damages in favor of an individual person who is injured due to a defendant's wanton or reckless disregard for public safety while engaged in the storage, handling, or transportation of hazardous materials, which are defined by federal law." 654 So.2d at 425. "If Congress had intended to preempt the authority of states to enact laws recognizing a cause of action for the recovery of

additional damages to persons injured by persons, who with wanton or reckless disregard for the safety of others, handle hazardous materials, Congress could easily have done so by including language to that effect . . . Congress did not . . . " *Id.*

*In Southern Pacific Transportation Co. v. United States,* 462 F.Supp. 1193 (E.D.Cal. 1978), the United States District Court for the Eastern District of California extensively analyzed the legislative intent behind the FRSA and the HMTA. In *Southern Pacific,* a railroad sought to recover damages when a government boxcar exploded. *Id.* at 1195. The government sought to dismiss the suit by claiming that its compliance with federal regulations preempted the right of the rail carrier to obtain compensation pursuant to the Federal Tort Claims Act. *Id.* at 1196. The government further argued that the comprehensive nature of the regulations and statutes governing railroad transportation clearly established Congress' intent to preempt the entire field of rail transportation. *Id.*

The *Southern Pacific* court extensively reviewed all relevant railroad statutes and regulations. During its examination, that court analyzed the legislative history behind the HMTA and the FRSA, holding that Congress **did not** intend the statute to block tort actions. The court specifically concluded that the HMTA permitted private citizens to obtain compensation despite the fact that a tortfeasor may have complied with federal standards. *Id.* at 1227. The court stated that:

> The Act explicitly expresses a Congressional intent not to pre-empt state laws unless those laws are contrary to the scheme of federal regulation. **Finally, the Act is wholly silent as to the**

> **remedies available to private persons injured by a violation of the Act or regulations.** Similar silence in the context of the Safety Appliance Acts has long been interpreted to leave the question of remedies to state law, and no basis for a different conclusion under this Act is apparent. The same result is appropriate as to the federal regulation of hazardous materials, which predated the Roseville explosions under the Explosives Transportation Act, 18 U.S.C. §§ 831-35. The Act authorized the promulgation of regulations for the safe transportation of explosives and other dangerous articles and provided criminal penalties for violations. **As with the Hazardous Materials Transportation Act, the Explosives Transportation Act evidences no intent to affect state re-evaluation of tort liability.** *Id.* at 1224 (emphasis added), *see also* n.11; H.R.Rep. No. 1975, re-printed in 1960 U.S. Code, Cong. 2 Admin. News 1960, pp. 3351, 3355 (*"The Committee feels that there is nothing in the Bill to preempt the field to the exclusion of the states"*).

The *Southern Pacific* court also held that the FRSA does not prohibit citizens from bringing tort claims for injuries.

> Although the Federal Railroad Safety Act of 1970 and the cases construing it reflect the Congressional intent to preempt the regulation of railroad safety and to achieve national uniformity, **no indication is given in the Act or its legislative history that Congress intended to pre-empt state tort liability doctrine affecting the remedies either for violation of the federal regulations in particular or for railroad related accidents in general.** In the absence of such indication of Congressional intent, this court

> concludes that Congress intended no alteration in their prevailing scheme of federal law as it interrelates with state law . . . Congress acts within the framework of existing law, both state and federal statutory and decisional. **That framework clearly left the incidence of an action for recovery of damages to state law when Congress deliberated and enacted the 1970 Act; Congressional silence should be deemed in this instance to leave the existing framework unaltered.**

*Southern Pacific*, 462 F.Supp. at 1226 (emphasis added).

Although the judicial precedent interpreting the legislative history is clear that Congress did not intend the HMTA and the FRSA to preempt state tort actions, Petitioner mistakenly asserts that the scope of federal regulations is so broad as to form the basis of preemption. Merely because extensive regulations exist does not mean Congress intended to preempt state law tort claims. In *Hillsborough County, Fla. v. Automated Medical Lab., Inc.*, 471 U.S. 707 (1985), the United States Supreme Court held that:

> We are even more reluctant to infer preemption from the comprehensiveness of **regulations** than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. **To infer pr -emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field its regulations will be exclusive.** Such a rule, of course, would be inconsistent

> with the federal-state bounds embodied by our supremacy clause jurisprudence.

*Id.* at 717 (emphasis added); *MacGillivray v. Lederle Lab., Inc.*, 667 F.Supp. 743, 745 (D.N.M. 1987).

Under the analysis that Petitioner wishes this Court to adopt, and which was properly rejected by the Trial Court, all state law tort claims would be preempted merely because the Secretary has enacted multiple rules regarding the packaging, labeling, loading and handling of shipments of hazardous materials. In this case, as in *Easterwood* and *In re Miamisburg*, the issue is not whether Petitioner could be held to a more stringent standard than stated by the federal regulations, but whether there is a federal regulation that substantially subsumes the subject matter of the plaintiffs' tort claims. 626 N.E.2d at 92 (*citing Easterwood*, 113 S.Ct. at 1378). As *Easterwood* and *In re Miamisburg* make clear, the specific regulations must be compared to the tort claims brought by the plaintiffs. *In re Miamisburg*, 626 N.E.2d at 92-93 (applying *Easterwood* methodology). However, Petitioner **improperly** asserts that because the Secretary has issued several regulations touching upon areas related to the Respondents' claims, Congress intended to preempt all tort claims. This argument is plainly in conflict with *Easterwood* and must be rejected. Congress, frankly, has not promulgated laws governing the Respondents' state law tort claims. In essence, the 10th Amendment is yet to have been repealed.

While negligence claims in areas substantially subsumed by federal regulations may in certain instances be

preempted, negligence claims **not** based on acts or procedures covered by the regulations **cannot** be preempted. For example, as mentioned in *Easterwood*, if the Respondents claimed that the train should have been traveling below the maximum speed approved by the Secretary, such claims would, under most circumstances, be preempted. 113 S.Ct. at 1743. However, if the railroad exceeded the maximum speed limit (or otherwise violated regulations) imposed by the Secretary, a negligence claim clearly would **not** be subsumed by the regulations.

Congress, merely by enacting regulations such as the FRSA and the HMTA, did not intend to relieve Petitioner of its duty to act reasonably under the circumstances. *"[A] negligence action based on a duty to slow or stop a train to avoid a specific, individual hazard is not pre-empted." Earwood v. Norfolk Southern Ry. Co.*, 845 F.Supp. 880, 885 (N.D. Ga. 1993) (citing *Easterwood*, 113 S.Ct. at 1742 and n. 15). In other words, e.g., despite the fact that a train may be operating below the maximum speed set by the Secretary, the railroad has a duty to slow down on a certain section of track if it knows, that due to track conditions, there is a strong likelihood that the train may derail and cause serious injury to a substantial number of people. *See Easterwood*, 113 S.Ct. at 1743 and n. 15; *In re Miamisburg*, 626 N.E. 2d at 94, n. 6.

This same logic applies to this case where Petitioner was well aware of the dangers and problems associated with the tank car, and, though it was in a position to do so, did nothing. As the *Easterwood* court suggested, claims by the Respondents are not preempted to the extent that they are based on the defendants' duty of due care to

avoid a **known** danger. Thus, Respondents' common-law claims against Petitioner are not preempted.

## CONCLUSION

Nowhere does the FRSA state that there is no private right of action for tortious conduct by a railroad company. This simply is not the law. Because the law permits private state-law-based causes of action for tortious conduct, Petitioner's argument must fail. The fact that certain federal regulations may deal with or touch upon the areas of railroad safety to which Mississippi tort law also is sought to be applied in this case, clearly is not sufficient for preemption under the FRSA, as interpreted by *Easterwood*.

For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 98-479

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

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KANSAS CITY SOUTHERN RAILWAY COMPANY,
*Petitioner,*

v.

CHARLOTTE MCKENNA, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the Circuit Court of Hinds County, Mississippi, First Judicial District**

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## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

Respondents' opposition suffers from one overriding flaw. It largely ignores *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993). This Court specifically noted in *Easterwood* that the Federal Railroad Safety Act ("FRSA") pre-empted not only state statutes and regulations, but also state standards arising from common law duties, where federal law covered the subject matter of those standards. Respondents nonetheless insist that the FRSA does not pre-empt their common law tort claims against KCS. They are wrong.

1. This Court observed in *Easterwood*—a case which, like this one, involved a common law state tort action against a railroad—that the FRSA's pre-emption provisions extended equally to "[l]egal duties imposed on railroads by the common law." 507 U.S. at 664; *see also*

49 U.S.C. § 20106 (pre-empting any state "law, rule, regulation, order, *or standard* relating to railroad safety" when federal regulations substantially subsume subject matter of state law) (emphasis added); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 520-523 (1992) (federal statute barring additional "requirements * * * imposed under state law" pre-empted common law claims). Thus, because federal regulations "covered the subject matter" of the *Easterwood* plaintiff's common law negligence claim that the train was traveling at excessive speed, this Court concluded that the claim could not go forward. 507 U.S. at 675. And because the FRSA provides only for civil penalties, *see* 49 U.S.C. § 20111, the plaintiff's claim for damages in tort was necessarily extinguished with her underlying claim. *See* Pet. 18.

The trial court in this case acknowledged *Easterwood*, but refused to follow it. While the court agreed with KCS that there were "loads of federal regulations that have to do with what it is this Defendant did and their claims against this Defendant," Pet. App. 3a, it nonetheless was "not persuaded that the federal statutes would preempt the state tort law claims." *Id.* 5a. In its view, FRSA pre-emption of plaintiffs' tort claims "would allow that no individual plaintiff would have a remedy for violations of any regulations that are specifically set forth in these acts." *Id.* The court accordingly denied KCS's motion for judgment on the pleadings, ruled that plaintiffs should be allowed "the opportunity to pursue a remedy based on state law claims," *id.*, and—in direct contravention of *Easterwood*—forced KCS to defend itself against thousands of clearly pre-empted state tort claims.[1]

[1] Respondents suggest that the trial court "was concerned by the fact that discovery was on-going and that all of the myriad of allegations made by the Plaintiffs were not preempted by federal regulation." Opp. 2-3. This assertion is belied by the court's comments and ruling on KCS's pre-emption claim.

2. To justify the trial court's decision, respondents, like the trial court, ignore the teaching of *Easterwood*. They instead advance the proposition that because the FRSA's pre-emption provision does not expressly state that common law tort claims are pre-empted under that Act, their claims may proceed. *See* Opp. 4-7. *Easterwood* established that that proposition is wrong. *See* 507 U.S. at 664; *see also Bryan* v. *Norfolk & W. Ry.*, 154 F.3d 899, 903-904 (8th Cir. 1998) (state common law negligence claim pre-empted under FRSA); *Elrod* v. *Burlington N. R.R.*, 68 F.3d 241, 244-245 (8th Cir. 1995) (same); *Hatfield* v. *Burlington N. R.R.*, 64 F.3d 559, 562-563 (10th Cir. 1995) (same); *O'Bannon* v. *Union Pacific R.R.*, 960 F. Supp. 1411 (W.D. Mo. 1997) (same). Even *In re Miamisburg Train Derailment Litigation*, 626 N.E.2d 85, 91 (Ohio 1994), a case upon which respondents heavily rely,[2] recognizes that "in the appropriate case, a state common-law tort claim can be within the preemptive reach" of the FRSA.

Each and every claim in plaintiffs' complaint falls well within FRSA's "preemptive reach," *id.*, because a dense network of federal railroad safety and hazardous-materials transportation regulations substantially subsumes the subject matter of each of plaintiffs' claims. *See* Pet. 6-7, 15-17 (discussing breadth and detail of federal regulations and application to plaintiffs' claims).[3] Under the

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[2] *See* Opp. 4, 5-6, 8-9, 14. Respondents also rely on a twenty-year-old district court case, long since superseded by this Court's decision in *Easterwood*, for their assertion that the FRSA "does not prohibit citizens from bringing tort claims for injuries." Opp. 13; *see also id.* 11-13 (quoting extensively from *Southern Pac. Transp. Co.* v. *United States*, 462 F. Supp. 1193 (E.D. Cal. 1978)). This Court's decision in *Easterwood*, of course, gives the lie to that statement. If federal regulations cover the subject matter of a common law tort claim, that claim may not go forward.

[3] Respondents suggest that KCS based its pre-emption arguments "on its assertions that the extensive nature of the regulations establishes that Congress *impliedly* intended to preempt state tort law

clear dictates of *Easterwood*, the trial court was required to dismiss plaintiffs' common law tort claims.

3. Respondents also completely ignore the second, independent ground on which the state trial court's ruling contradicted *Easterwood*. Because the court erroneously concluded that plaintiffs' request for damages circumvented the FRSA pre-emption statute, the court did not address plaintiffs' claims individually, instead issuing a blanket denial of KCS's motion for judgment on pre-emption grounds. But as KCS pointed out, to determine whether a complaint containing multiple claims is pre-empted under the FRSA, a court must examine each individual claim to determine whether federal regulations cover the subject matter of that claim. *See* Pet. 21; *Easterwood*, 507 U.S. at 665; *Cipollone*, 505 U.S. at 523-524 (Court's pre-emption analysis addressed "each category of damages actions in turn"); *Bryan*, 154 F.3d at 901-904 (analyzing each claim of negligence separately for FRSA pre-emption). Because plaintiffs' individual claims against KCS involved several different subject matters—namely, the transportation of hazardous materials, inspection of tank cars, hiring and training of hazardous materials employees, and proper public-sector notification and emergency procedures—*Easterwood* required the trial court to address and resolve KCS's pre-emption defense as to each claim.

4. Finally, respondents point to a Louisiana court of appeals case to justify the decision below. That case proves only that Louisiana—the other state currently over-

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claims." Opp. 5 (emphasis added). Not so. The bulk of KCS's petition was devoted to its argument that the *express* pre-emption provisions of the FRSA applied to respondents' common law tort claims, under the clear dictates of *Easterwood*. *See* Pet. 6-8, 15-17 (noting that federal regulations substantially subsume the subject matter of each of plaintiffs' claims); *compare id.* 20 n.16 (discussing grounds for finding implicit FRSA pre-emption, even apart from express preemption).

seeing a massive, and clearly pre-empted, tort action against KCS—has ignored *Easterwood*'s dictates more than once, and confirms the need for review by this Court. In *In re New Orleans Train Car Leakage Fire Litigation*, 671 So.2d 540 (La. App. 1996), *writ denied*, 675 So.2d 1120 (La.), *cert. denied*, 117 S. Ct. 512 (1996), the court of appeals was asked to determine whether the FRSA pre-empted a claim arising under La. Civ. Code art. 2315.3, the state punitive damages statute. Although *New Orleans Train Car* involved FRSA pre-emption, the court of appeals simply adopted the reasoning of an earlier case involving pre-emption under the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.*,[4] concluding that because the FRSA's penalty provisions and the state damages statute had "different purposes," claims under the damages statute survived FRSA pre-emption. 671 So.2d at 546. This was clear legal error under *Easterwood*. *See* Pet. 18-19.

* * * *

For the foregoing reasons, and for those in the petition, the petition should be granted.

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[4] In *Haydel* v. *Hercules Transport, Inc.*, 654 So.2d 418 (La. App.), *writ denied*, 656 So.2d 1019 (La. 1995), the court of appeals reviewed the HMTA's pre-emption provisions in light of a state tort claim for punitive damages under the same article of the Louisiana Code. Substantively different from those of the FRSA, the HMTA's pre-emption provisions provide that a state requirement is pre-empted by federal law if complying with the state requirement is "not possible," or if the state requirement poses an "obstacle" to the purposes of the HMTA. 49 U.S.C. § 5125. A state law "not substantively the same" as the federal statutes or regulations is also pre-empted under the HMTA if it addresses, *inter alia*, the classification, packing, and shipping of hazardous materials. *Id.* § 5125(b); *see also* Pet. 9 n.7 (discussing HMTA pre-emption provisions).

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